No. 92-1639

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

THE CITY OF CHICAGO, *et al.*,
Petitioners,
v.
ENVIRONMENTAL DEFENSE FUND, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF WHEELABRATOR TECHNOLOGIES INC. AND INTEGRATED WASTE SERVICES ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

MARK P. PAUL
Vice President and General Counsel
WHEELABRATOR TECHNOLOGIES INC.
Liberty Lane
Hampton, NH 03842
(603) 929-3000

HAROLD HIMMELMAN
Counsel of Record
DAVID M. FRIEDLAND
MARGARET LATTIN BAZANY
BEVERIDGE & DIAMOND, P.C.
1350 I Street, N.W., Suite 700
Washington, D.C. 20005
(202) 789-6000

INTEGRATED WASTE SERVICES ASSOCIATION
1133 21st Street, N.W.
Suite 205
Washington, D.C. 20036
(202) 467-6240

Attorneys for Amici

August 19, 1993

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

39 pp

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

No. 92-1639

THE CITY OF CHICAGO, *et al.*,
Petitioners,

v.

ENVIRONMENTAL DEFENSE FUND, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF WHEELABRATOR TECHNOLOGIES INC. AND INTEGRATED WASTE SERVICES ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

Wheelabrator Technologies Inc. and the Integrated Waste Services Association respectfully file this brief as *amici curiae* in support of the petitioners. Written consent has been obtained from counsel for petitioners and respondents for the filing of this brief pursuant to Supreme Court Rule 37. The letters reflecting consent have been filed with the clerk's office.

INTEREST OF AMICI CURIAE

Wheelabrator Technologies Inc. ("Wheelabrator") is the defendant in the Second Circuit case addressing the

legal status of ash at the Westchester County Resource Recovery Facility ("Facility"). The opinion in that case is in direct conflict with the Seventh Circuit opinion under review here. Wheelabrator is a founding member of the Integrated Waste Services Association.

As the prevailing party in the Second Circuit case, Wheelabrator brings a unique perspective to this proceeding. Wheelabrator has been in the business of designing, constructing, owning and operating resource recovery facilities ("RRFs") for over 15 years. Currently, Wheelabrator operates 14 RRF plants and five small power facilities which each day generate 13 million kilowatt hours of electricity, equivalent to the electricity generated by over 35,000 barrels of oil. Wheelabrator's RRFs eliminate eighty percent of the weight and ninety percent of the volume of municipal solid waste while recovering over 600 kilowatt hours per ton. Wheelabrator is one of the nation's ten largest independent power producers.

The Integrated Waste Services Association ("IWSA") is a national trade association comprised of firms that design, construct, operate and own municipal solid waste management facilities, including composting, recycling and resource recovery facilities for cities and counties. IWSA is committed to integrated solid waste management policies that enable communities across the nation to utilize the best combination of environmentally safe and cost effective solid waste options to meet local needs—including waste reduction, recycling, RRFs and landfilling. This integrated approach is accepted by the Environmental Protection Agency ("EPA"), state and local governments and major public policy organizations such as the U.S. Conference of Mayors and others.

Resource recovery facilities are an important component of integrated waste management. The 142 RRFs currently operating in the United States manage about 17% of our nation's trash. These plants also produce the equivalent amount of energy to power approximately 1.3 million homes, saving 31 million barrels of oil that would

otherwise cost three-quarters of a billion dollars each year. Ash from RRFs is currently managed in landfills (with other municipal wastes) or in monofills (a landfill containing only ash). EPA has stated on numerous occasions that management of ash in these ways is fully protective of human health and the environment. IWSA is vitally interested in the statutory and regulatory status of ash from RRFs because it is IWSA members who bear the responsibility, along with local government entities, for compliance with Resource Conservation and Recovery Act ("RCRA") regulations for ash.

The City of Chicago's brief will demonstrate that the plain language of Section 3001(i) of RCRA excludes the entire waste stream processed at an RRF, including ash residues, from regulation as hazardous waste under the RCRA program. *Amici* agree with Chicago or this point as set forth below. In addition, *Amici* emphasize in this brief that any possible statutory ambiguity regarding the regulatory status of ash is resolved by the clear and incontrovertible administrative and legislative history of Section 3001(i) of RCRA—the "clarification of household waste exclusion." *See* 42 U.S.C. § 6921(i).

STATEMENT OF THE CASE

A. Introduction

Six of the eight judges who have addressed the issue have properly held that Section 3001(i) of RCRA excludes the ash from resource recovery facilities from regulation as a hazardous waste. The Seventh Circuit majority holding to the contrary fundamentally misreads the language, purpose and context of the statute, leading to a bizarre result—a statute that was clearly intended to clarify and broaden the applicability of EPA's household waste exclusion is instead held to narrow it.

B. The United States District Court for the Southern District of New York Held That Section 3001(i) Excludes Ash From Regulation as a Hazardous Waste and the Second Circuit Affirmed.

The Environmental Defense Fund ("EDF") filed complaints against Wheelabrator in the United States District Court for the Southern District of New York ("Southern District") and against the City of Chicago in the United States District Court for the Northern District of Illinois on January 27, 1988, alleging in both cases that the ash from the RRFs should be regulated as a hazardous waste under Subtitle C of RCRA, 42 U.S.C. §§ 6921-39e, rather than as a nonhazardous waste under Subtitle D, 42 U.S.C. §§ 6941-49a. Chicago will chronicle the history of the Seventh Circuit proceedings in its brief. Wheelabrator and IWSA describe below the background of the Southern District and Second Circuit proceedings.

Wheelabrator moved for dismissal or summary judgment on the ground that Section 3001(i) of RCRA excludes ash from hazardous waste regulations if the RRF complies with the requirements of that statutory provision. EDF cross-moved for summary judgment.

In an exhaustive opinion rendered on November 21, 1989, Judge Haight agreed with Wheelabrator that ash managed at a facility meeting the requirements of 3001(i) is excluded from regulation as a hazardous waste under RCRA. *Environmental Defense Fund v. Wheelabrator Technologies Inc.*, 725 F. Supp. 758, 764-70 (S.D.N.Y. 1989), *aff'd*, 931 F.2d 211 (2d Cir.), *cert. denied*, —— U.S. ——, 112 S. Ct. 453 (1991). The Court directly addressed and rejected EDF's central thesis that Section 3001(i) was enacted merely to exempt the Facility from being regulated as a hazardous waste treatment, storage and disposal ("TSD") facility. Such as interpretation would, the court held, render the statute superfluous:

> EDF contends that Section 3001(i) merely exempts the Facility from regulation as a treatment, storage and disposal ("TSD") facility (facilities that manage, rather than produce hazardous waste). However, by its own terms Section 3001(i) does not apply to resource recovery facilities that accept hazardous waste for incineration, and plaintiff argues that if a resource recovery facility should ever accept hazardous waste, even accidentally, it would not be eligible for exemption even from regulation as a TSD facility. Under plaintiff's construction of Section 3001(i) it is difficult to understand what, if any, benefit the Facility derives from the exemption. Plainly, if the Facility never accepts hazardous waste for processing, it would not be subject to regulation as a TSD facility even absent the exclusion.

Id. at 763, n.12.

The Court also found that the Facility satisfied the Section 3001(i) requirement that it have adequate contractual safeguards to prevent the acceptance of hazardous waste and adequate notification and inspection procedures. *Id.* at 773, 772. The Court denied Wheelabrator's motion for summary judgment, however, to give EDF an opportunity to explore through expedited discovery "whether and with what frequency the Facility accepts hazardous waste for processing." *Id.* at 775.

EDF engaged in discovery and ultimately conceded by stipulation that it was aware of no evidence that the Facility accepted hazardous waste from commercial or industrial sources. Wheelabrator filed a second motion for summary judgment, EDF stipulated that it would not oppose entry of judgment in Wheelabrator's favor, and the Court entered summary judgment for Wheelabrator on April 4, 1990.

The Second Circuit affirmed in a unanimous opinion, adopting Judge Haight's "thorough and well reasoned opinion," and this Court denied *certiorari*. *EDF v. Wheelabrator Technologies, Inc.*, 931 F.2d 211 (2d Cir.), *cert. denied*, —— U.S. ——, 112 S. Ct. 453 (1991).

The district court in Chicago subsequently issued a decision in complete accord with the Southern District.

Environmental Defense Fund v. City of Chicago, 727 F. Supp. 419 (N.D. Ill. 1989), *rev'd*, 948 F.2d 345 (7th Cir. 1991), *vacated and remanded*, —— U.S. ——, 113 S. Ct. 486 (1992), *adhered to on remand*, 985 F.2d 303 (7th Cir.), *cert. granted*, —— U.S. ——, 61 U.S.L.W. 3851 (1993).

C. Regulation of Ash Under Subtitle D Is Safe, Environmentally Sound, and Promotes Resource Recovery.

1. *Ash Is Safely Managed Under Subtitle D.*

Two judges in the Seventh Circuit raise the specter of environmental catastrophe if ash is not regulated as a hazardous waste. These judges assert that "massive amounts of hazardous waste" may "seep into the ground and water table." *EDF v. City of Chicago*, 948 F.2d 345, 352 (7th Cir. 1991). This is unsubstantiated hyperbole. There is absolutely no evidence in either the Seventh or Second Circuit cases of any ground or surface water contamination or any other health, safety or environmental problem resulting from management of ash.

In fact, several recent studies confirm that ash does not pose a health threat when disposed in Subtitle D landfills or monofills.[1] Moreover, recent studies conclude that "leachate" (the liquid mixture created when rain or snow filters through a landfill) from Subtitle D landfills con-

[1] Although ash may fail EPA's laboratory test for toxicity, which is intended to duplicate leaching conditions in landfills over time, actual studies reveal that hazardous constituents, including lead and cadmium, do not leach from ash at any rate remotely approaching that predicted by the laboratory method. NUS Corporation on behalf of U.S. Environmental Protection Agency, Document No. EPA/530-SW-87-028A, "Final Characterization of Municipal Waste Combustion Ashes and Leachates From Municipal Solid Waste Landfills, Monofills and Codisposal Sites," Vol. 1 at 7-7 (Oct. 1987) ("The EP toxic procedure extracted significantly higher levels of metals than were found in the actual leachate.") *See also* Richard W. Goodwin, *Defending the Character of Ash*, VI Solid Waste & Power (Sept.-Oct. 1992) at 18, 20.

taining ash routinely meets or approaches federal drinking water standards.[2] Indeed, EPA has consistently taken the position that ash "can be regulated in a manner that will be protective of human health and the environment under RCRA Subtitle D."[3] In addition, stringent new Subtitle D landfill regulations will provide additional assurance that ash is safely disposed.[4]

[2] Coalition on Resource Recovery and the Environment and NUS Corporation on behalf of U.S. Environmental Protection Agency, Document No. EPA/530-SW-90-029A, "Characterization of Municipal Waste Combustion Ash, Ash Extracts, and Leachates" 7-4 (Mar. 1990) (majority of leachate samples from five different Subtitle D landfills containing ash met federal drinking water standards for metals). *See also* Solid Waste Association of North America and Center for Resource Recovery, Technology and Science, "Municipal Waste Combustion Ash and Leachate Characterization—Monofill Fourth Year Study" 22 (Mar. 1992) (fourth yearly study of an ash monofill indicates that, except for manganese, leachate samples met federal drinking water standards for all analyzed metals).

[3] William K. Reilly, Administrator, U.S. Environmental Protection Agency, "Exemption for Municipal Waste Combustion Ash From Hazardous Waste Regulation Under RCRA Section 3001(i)" (Sept. 18, 1992) at 1. ("Reilly Memorandum").

[4] 56 Fed. Reg. 50,978 (1991). These regulations require that landfills comply with specific "location criteria" to ensure that landfills will not be located in certain areas where they could pose a threat. 40 C.F.R. §§ 258.10-258.16. In addition, the regulations impose stringent operating restrictions, such as drainage requirements, to eliminate discharges of pollutants to surface water. *See, e.g.*, 40 C.F.R. §§ 258.25, 258.27. New landfills must include liners and leachate collection systems to prevent releases of pollutants to ground water. 40 C.F.R. § 258.40. Finally, municipal landfill operators must monitor groundwater to detect any releases from a landfill, and if any releases are detected, must clean them up. 40 C.F.R. §§ 258.50-.58. The regulations are due to become effective for all facilities on October 9, 1993. 56 Fed. Reg. 51,040 (1991). That deadline remains in place for new landfills and existing landfills that accept 100 tons or more per day. EPA has proposed to extend the deadline to April 9, 1994 for existing small landfills accepting less than 100 tons per day and meeting certain other requirements. 58 Fed. Reg. 40,568 (1993).

2. *The Section 3001(i) Exclusion is One of Several Exclusions of Waste Streams from RCRA Hazardous Waste Regulation.*

Section 3001(i) is not the only statutory or regulatory provision excluding waste from Subtitle C regulation for policy reasons. Other exclusions exist for coal and other fossil fuel combustion wastes; drilling fluids and other oil, natural gas and geothermal energy exploration, development or production wastes; ore and mineral extraction, beneficiation and processing wastes; and cement kiln dust wastes. 42 U.S.C. §§ 6921(b)(2) and (3). Congress directed EPA to prepare a Report to Congress on each of these wastes, to hold hearings, and then to determine whether regulation under Subtitle C is warranted. 42 U.S.C. §§ 6921(b)(2), (3)(A), and (3)(C) and 6982(f), (m), (n), (o), and (p). These exclusions have continued for many years, some pending the outcome of the studies, and others because EPA has determined that regulation under Subtitle C is not appropriate.[5] In addition, EPA has excluded from hazardous waste regulation agricultural wastes returned to the soil as fertilizers; mining overburden returned to the mine site; certain trivalent chromium wastes; and certain arsenical-treated wood and wood products. 40 C.F.R.

[5] Cement kiln dust wastes remain excluded from Subtitle C regulation pending completion of the study and a regulatory determination by EPA. For the remaining categories, EPA has determined that Subtitle C regulation is not appropriate for any of the wastes considered to date. *See* 58 Fed. Reg. 42,466 (1993) (determination that certain coal combustion wastes are not appropriate for Subtitle C regulation); 53 Fed. Reg. 25,446 (1988) (regulation of certain oil, gas, and geothermal exploration, development, and production wastes under Subtitle C is unwarranted); 58 Fed. Reg. 15,284 (1993) (clarification of the scope of exploration, development and production wastes excluded from Subtitle C regulation); 51 Fed. Reg. 24,496 (1986) (regulation of wastes from the extraction and beneficiation of ores and minerals under Subtitle C is not warranted); 56 Fed. Reg. 27,300 (1991) (determination that certain mineral processing wastes are not appropriately regulated under Subtitle C).

§§ 261.4(b)(2), (3), (6) and (9) as amended at 57 Fed. Reg. 30,657-58 (1992).

All of these provisions demonstrate that exclusions from Subtitle C are not unusual; rather, the exclusions reflect determinations by Congress and EPA that certain waste streams should not be subject to hazardous waste regulation for important policy reasons. Indeed, in a regulatory determination issued two weeks ago, EPA decided not to impose Subtitle C regulation on ash from coal fired electric utilities, notwithstanding that the ash at times exhibits levels of lead, cadmium, chromium, mercury and arsenic that exceed the toxicity characteristic.[6]

3. *Management of Ash Under Subtitle D Promotes the Policy Objectives of RCRA.*

In enacting RCRA in 1976, Congress expressed its desire to promote resource recovery as well as the safe management of hazardous wastes. Congress specifically recognized that resource recovery facilities could contribute to a solution to solid waste disposal problems in this country. Two of the stated objectives of RCRA were to assist states in developing solid waste management plans "(including resource recovery and resource conservation systems)," 42 U.S.C. § 6902(1), and to promote "solid waste management, resource recovery and resource conservation systems which preserve and enhance the quality of air, water, and land resources." 42 U.S.C. § 6902(7).

In 1980, Congress passed further amendments to RCRA in legislation known as the Solid Waste Disposal Act Amendments of 1980, Pub. L. No. 96-463, 46 Stat. 2055 (1980) (the "SWDA"), reaffirming Congress's strong support for the development of resource recovery facili-

[6] 58 Fed. Reg. 42,466, 42,476 (1993). EPA noted that regulation of ash from coal combustion under Subtitle C would impose unnecessary burdens in excess of what is required to protect human health and the environment. *Id.* at 42,477.

ties within Subtitle D's solid waste management framework. For example, the SWDA provided that EPA was authorized to assist the states in removing or modifying "legal, institutional, and economic impediments which have the effect of impeding the development of systems and facilities to recover energy and materials from municipal waste . . . ." 42 U.S.C. § 6948(d)(3).[7]

These congressional actions prior to the enactment of Section 3001(i), along with the clear congressional intent to clarify the scope of the household waste exclusion in 1984 as it applied to resource recovery facilities, demonstrate that Congress intended to promote resource recovery facilities within the framework of Subtitle D. It would make little sense for Congress to have so carefully crafted a system to encourage the development of resource recovery within the framework of Subtitle D only to have failed to include the management of ash from those facilities within that same system.

SUMMARY OF ARGUMENT

Congress enacted—and specifically denominated—Section 3001(i) as a clarification of EPA's regulatory household waste exclusion. All parties agree that the regulatory exclusion excludes the household waste stream, in all phases of its management, from hazardous waste regulation, including ash remaining after incineration by a resource recovery facility.

---

[7] *See also* 42 U.S.C. § 6911(b) (creating interagency coordinating committee to coordinate all federal agency activities dealing with resource conservation and recovery from solid waste); *id.* § 6941 (one of the objectives of Subtitle D program is to assist in development of methods of waste disposal which maximize the utilization of energy and materials recoverable from solid waste); *id.* § 6943(c)(1)(B) (states may receive financial assistance under Subtitle D from EPA only if the State program analyzes and offers recommendations to overcome the impediments to resource recovery systems and facilities).

There was, however, in 1984, some question as to whether the typical resource recovery facility that accepted nonhazardous solid wastes from schools, churches, municipal buildings and the like together with household waste was covered by the household waste exclusion. It is this issue to which Congress responded in enacting Section 3001(i). Congress clarified its original intent to include such resource recovery facilities within the scope of the exclusion as long as those facilities adopted new prophylactic measures to ensure against the receipt and burning of wastes regulated as hazardous.

Congress expressed its intent through statutory language providing that a resource recovery facility shall "not be deemed to be treating, storing, disposing of, or otherwise managing hazardous wastes" if certain conditions are met. The management of ash from incineration of waste at a resource recovery facility fits squarely within this statutory language.

The complete and uncontroverted legislative history of Section 3001(i), together with the administrative history of the household waste exclusion, confirm that ash from a resource recovery facility meeting the requirements of Section 3001(i) is excluded from Subtitle C regulation. Any other reading would, as the Second Circuit unanimously affirmed, deprive the statute of any meaning.

EDF goes through tortured statutory construction and ignores clear legislative purpose to achieve the result that its policy predilections favor. EDF cannot, however, ultimately ignore that its argument turns on its head a statutory provision that was designed to encourage, with new environmental safeguards, resource recovery as an important solid waste disposal option.

ARGUMENT

I. THE SEVENTH CIRCUIT ERRED IN HOLDING THAT SECTION 3001(i) OF RCRA DOES NOT EXCLUDE ASH FROM REGULATION AS A HAZARDOUS WASTE.

It is a cardinal rule of statutory construction that statutes are to be read "as a whole, since the meaning of statutory language, plain or not, depends on context." *Conroy v. Aniskoff*, —— U.S. ——, 113 S. Ct. 1562, 1565 (1993) (citations omitted). Statutory terms should be interpreted on the basis of the meaning that is "(1) most in accord with context and ordinary usage, and thus most likely to have been understood by the *whole* Congress which voted on the words of the statute (not to mention the citizens subject to it), and (2) most compatible with the surrounding body of law into which the provision must be integrated . . . ." *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 528 (1989) (Scalia, J., concurring in the judgment) (emphasis in original). In this case, Congress specifically enacted and designated Section 3001(i) as a "clarification" of EPA's pre-existing household waste exclusion. Upon examination of that exclusion, the plain language of Section 3001(i), and the issue that Congress enacted Section 3001(i) to "clarify," it is clear that Section 3001(i) excludes ash from regulation as a hazardous waste under RCRA.

A. The 1980 Household Waste Exclusion that was "Clarified" by Section 3001(i) Excludes from Regulation as Hazardous Waste Ash from RRFs that Burn Only Household Waste.

When Congress enacted RCRA in 1976, it delegated to EPA the task of defining by regulation those wastes that would be subject to the requirements of Subtitle C rather than the Subtitle D requirements applicable to nonhazardous solid wastes. 42 U.S.C. § 6921. Congress did not, however, leave EPA entirely without guidance; it expressed its intent that all household and general municipal

wastes should be excluded from hazardous waste regulations. The Report of the Senate Committee on Public Works accompanying the legislation that eventually became RCRA explicitly stated that the hazardous waste permit program "is not to be used to control the disposal of hazardous substances used in households or to extend control over general municipal wastes based on the presence of such substances." S. Rep. No. 988, 94th Cong., 2d Sess. 16 (1976).

In its first set of final regulations implementing RCRA, issued in May 1980, EPA responded to this expression of congressional intent by promulgating a provision known as the "household waste exclusion." 45 Fed. Reg. 33,120 (1980). That regulation provided in pertinent part as follows:

> § 261.4 Exclusions
>
> (b) *Solid wastes which are not hazardous wastes.* The following solid wastes are not hazardous wastes:
>
> (1) Household waste, including household waste that has been collected, transported, stored, treated, disposed, recovered (e.g., refuse-derived fuel) or reused. "Household waste" means any waste material (including garbage, trash and sanitary wastes in septic tanks) derived from households (including single and multiple residences, hotels and motels).

Id. (codified as amended at 40 C.F.R. § 261.4(b)(1)).

EPA stated unequivocally in the preamble to this regulation (the "1980 Preamble") that the entire household waste stream is excluded from hazardous waste regulation and that ash residue from the incineration of household waste is also excluded from hazardous waste regulation:

> The Senate language makes it clear that household waste does not lose the exclusion simply because it has been collected. *Since household waste is excluded in all phases of its management, residues remaining after treatment (e.g., incineration, thermal treatment) are not subject to regulation as hazardous*

> *waste*. Such wastes, however, must be transported, stored, treated and disposed in accord with applicable State and federal requirements concerning management of solid waste . . . .

Id. at 33,099 (emphasis added). EPA further justified its determination that ash from the incineration of household waste is excluded from regulation on the ground that Congress intended to "exclude *waste streams* generated by consumers at the household level." *Id.* at 33,099 (emphasis in original). Thus, EPA exempted household waste during all phases of its management, from origination in households, through treatment by RRFs, to ultimate disposal by landfilling the ash residue.

The 1980 Preamble language is critical because it clearly refutes EDF's and the Seventh Circuit's central contention that the statutory language of Section 3001(i) —"a resource recovery facility . . . shall not be deemed to be treating, storing, disposing of, or otherwise managing . . ."—does not encompass what EDF characterizes as the "generation" of ash by the RRF. Even EDF concedes that the original administrative exclusion would apply to ash from RRFs that accept and burn only household waste. Appellant's Brief at 27, *EDF v. Wheelabrator*, 931 F.2d 211 (2d Cir. 1991) (No. 90-7437); Appellants' Brief at 27, *EDF v. City of Chicago*, 948 F.2d 345 (7th Cir. 1991) (No. 90-3060). Nevertheless, neither the regulatory text, nor the preamble to the very household waste exclusion that was clarified in Section 3001(i) contains the term "generation." EDF does not and cannot explain why, under its theory, the absence of the term "generation" in the 1980 household waste exclusion is not important, yet the absence of that term in the language of 3001(i) is so critical.

Moreover, the 1980 Preamble demonstrates that the term "otherwise managing" in Section 3001(i) includes management of ash.[8] The Preamble provides that household waste is excluded in "all phases of its management," with "residues remaining" after "incineration" specifically defined as a covered "phase." Accordingly, ash is not subject to regulation as hazardous waste because it is part of the "management" of the household waste stream generated by consumers at the household level.

[8] Section 3001(i) also contains the terms "storing" and "disposing," which, as discussed in the next section, can easily be interpreted to include the storing of ash on-site at the RRF and disposal of ash in a landfill.

EPA thus established an exclusion applicable to the entire household waste stream—as even EDF concedes. Appellant's Brief at 27, *Wheelabrator* (No. 90-7437); Appellants' Brief at 27, *City of Chicago* (No. 90-3060). It is this exclusion that Congress addressed in 1984 by enacting Section 3001(i), clarifying that the exclusion applied not only to ash resulting from the incineration of household waste, but also to ash generated by RRFs from the incineration of household waste *and* nonhazardous commercial and industrial solid waste, which waste is similar in composition to wastes generated by households. *See* William K. Reilly, Administrator, U.S. Environmental Protection Agency, "Exemption for Municipal Waste Combustion Ash From Hazardous Waste Regulation Under RCRA Section 3001(i)" (Sept. 18, 1992) at 2 ("Reilly Memorandum").[9]

B. The Plain Language of Section 3001(i) Excludes the Management of Ash from Hazardous Waste Regulation.

Virtually all RRFs accept municipal solid waste composed of waste from households as well as nonhazardous

[9] The 1984 statutory clarification was not the first such clarification of the household waste exclusion. EPA amended this provision in 1984 to include several additional categories of wastes that were similar enough to be treated as "household waste," including wastes from bunkhouses, ranger stations, crew quarters, campgrounds, picnic grounds, and day-use recreation areas. *See* 49 Fed. Reg. 44,978 (1984).

solid waste from sources such as schools, restaurants, municipal and private office buildings, small businesses and the like. While it was clear, as discussed above, that ash from an RRF that accepted only household waste was excluded from regulation under the household waste exclusion, there was some uncertainty in 1984 as to the status of the typical facility that accepted wastes similar to, but from sources other than, households. It is this uncertainty to which Congress responded when it enacted Section 3001(i) "clarifying" that the household waste exclusion applies to RRFs that accept such nonhazardous commercial and industrial waste as long as certain prophylactic procedures are in place. The statute provides:

Clarification of Household Waste Exclusion.

> A resource recovery facility recovering energy from the mass burning of municipal solid waste shall not be deemed to be treating, storing, disposing of, or otherwise managing hazardous wastes for the purposes of regulation under this subchapter, if—
>
> (1) such facility—
>
> (A) receives and burns only
>
> (i) household waste (from single and multiple dwellings, hotels, motels, and other residential sources), and
>
> (ii) solid waste from commercial or industrial sources that does not contain hazardous waste identified or listed under this section, and
>
> (B) does not accept hazardous wastes identified or listed under this section, and
>
> (2) the owner or operator of such facility has established contractual requirements or other appropriate notification or inspection procedures to assure that hazardous wastes are not received at or burned in such facility.

42 U.S.C. § 6921(i).

The statute plainly excludes all waste management activities of an RRF, including the management of ash, from hazardous waste regulation under RCRA. By using the all-encompassing language "treating, storing, disposing of, or otherwise managing hazardous wastes," Congress expresed its intent that all activities of a qualifying RRF are excluded from hazardous waste regulation, and it did so by using essentially the same language found in EPA's original household waste exclusion and the preamble discussion of that exclusion. As the Solicitor General put it in its brief for the United States supporting Chicago's petition for *certiorari*:

> Indeed, Section 3001(i)'s express provision that a qualifying resource recovery facility "shall not be deemed to be treating, storing, disposing of, or otherwise managing hazardous wastes" strongly suggests that EPA's household waste exclusion applies to all facets of the facility's operations, including incineration, pre- and post-incineration storage, and disposal of residues.

Brief of the United States as *Amicus Curiae* at 15, *City of Chicago v. EDF*, —— U.S. ——, 113 S. Ct. 486 (1992) (No. 91-1328).

1. *The statutory term "otherwise managing hazardous wastes" includes the management of ash.*

The term "otherwise managing hazardous wastes" is not specifically defined under RCRA, but there can be little doubt as to its breadth as used in Section 3001(i). First, and foremost, because Congress was, in enacting Section 3001(i), clarifying the 1980 household waste exclusion, Congress was clearly aware that the term "management" or "managing," in the context of household waste, had a well-defined meaning which included "residues remaining after treatment" of waste. Congress, in other words, used the same language in Section 3001(i) as EPA used in 1980 to define the scope of the household waste exclusion. If Congress wanted to depart from the scope of EPA's exclusion, it could have expressly narrowed that language.

Moreover, "management" is also the broadest activity described in Subtitle C; it comprises the entire range of activities relating to hazardous waste. Subtitle C, of which Section 3001(i) is a part, is entitled "Hazardous Waste Management" and includes sections dealing with identification and listing, 42 U.S.C. § 6921; generation, 42 U.S.C. § 6922; transportation, 42 U.S.C. § 6923; and treatment, storage and disposal of hazardous waste, 42 U.S.C. §§ 6924, 6925. The common sense reading of the phrase "or otherwise managing" is that it was intended to incorporate all these activities.

The term "hazardous waste management," although not identical to the phrase "otherwise managing hazardous wastes" in Section 3001(i), also supports this construction. It is defined broadly as "the systematic control of the collection, source separation, storage, transportation, processing, treatment, recovery, and disposal of hazardous wastes." 42 U.S.C. § 6903(7). "Hazardous waste management" covers what an RRF does with ash. The facility collects, stores, transports and disposes of the ash in a landfill.

2. *The statutory terms "disposing" and "storing" encompass the activities of a resource recovery facility regarding ash.*

The term "disposal" is also broadly defined in RCRA as "the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water . . . ." 42 U.S.C. § 6903(3). This definition of "disposal" confirms the natural reading of the statute that the activity of placing ash residue into a landfill constitutes an excluded disposal activity under Section 3001(i). In the context of the operation of a resource recovery facility, placing ash in a landfill clearly fits within the meaning of the term "disposing" because the principal purpose of such a facility is to reduce the volume of solid waste by processing it to an ash residue prior to disposal.

The term "storage," when used in connection with hazardous waste, is defined in RCRA as "the containment

of hazardous waste, either on a temporary basis or for a period of years, in such a manner as not to constitute disposal . . . ." 42 U.S.C. § 6903(33). The inclusion of the term "storing" in Section 3001(i) can be read to encompass the ash handling practices at an RRF. Ash is accumulated, collected, and stored at an RRF prior to ultimate disposal in a landfill or beneficial reuse. Thus, by including the terms "storing" and "disposing" in the household waste exclusion, Congress meant to exclude from Subtitle C those activities of an RRF accompanying the handling of ash.

3. *EDF's reading of Section 3001(i) renders the statutory language meaningless.*

EDF makes two arguments regarding the plain meaning of the statutory language. First, EDF argues that Section 3001(i) merely exempts an RRF from being deemed a hazardous waste TSD facility for the receipt of hazardous wastes coming into the facility. Appellants' Brief at 25, *City of Chicago* (No. 90-3060); Appellant's Brief at 25, *Wheelabrator* (No. 90-7437). Second, EDF claims that RRFs "generate" the ash residue, and, since the statute does not specifically include the term "generating," it does not cover ash. *Id.* Both of these arguments are meritless.

EDF's first argument renders the statute meaningless. Section 3001(i), by its very terms, allows a facility to accept only household wastes and commercial and industrial wastes that are nonhazardous. Section 3001(i) does not apply to any facility that accepts waste that is regulated as hazardous. Because household waste has been excluded from regulation as hazardous since 1980, and because an RRF is not entitled to the benefit of Section 3001(i) if it accepts other wastes that are regulated as hazardous, EDF's argument deprives the statute of any meaning. As the Southern District held:

> Under [EDF's] construction of Section 3001(i) it is difficult to understand what, if any, benefit the Facility derives from the exemption. Plainly, if the

> Facility never accepts hazardous waste for processing, it would not be subject to regulation as a TSD facility even absent the exclusion.

725 F. Supp. at 763, n.12.

The Seventh Circuit made the same mistake as EDF when the majority stated cavalierly and without citation or foundation (because there is none):

> Actually, Congress was interested in excluding from the extremely complex regulations that apply to facilities that specifically target hazardous waste municipal incinerators that inadvertently process hazardous materials that slip in with all the other junk.

948 F.2d at 347. In fact, there is not a shred of evidence that this was Congress's intent, and, more importantly, there is overwhelming evidence, discussed in the next section, that Congress's intent was, as all judges but two in the Seventh Circuit have held, to broaden the applicability of the household waste exclusion to RRFs that process nonhazardous waste from commercial and industrial sources together with household waste.

EDF's argument regarding the term "generating" is also meritless. As noted above, nowhere does the regulatory household waste exclusion mention "generation," but all parties—including EDF—agree that the regulatory exclusion covers the management of ash. Indeed, there was no need to include the term "generating" in Section 3001(i) for several reasons. First, the household waste exclusion covered all phases of management of the household waste stream, including management of ash, and because Congress was merely clarifying the applicability of that exclusion in 1984, there was no need to explicate any further what was already self-evident from the language and administrative history of the exclusion.

In addition, Congress may very well have felt that, as discussed above, management of ash was covered by the other statutory terms it used. As the Solicitor General put it:

> The fact that Section 3001(i) fails to state that the facility shall not be deemed to be "generating" hazardous wastes does not undermine [the conclusion that the statute applies to all facets of the facility's operations]. The absence of that term likely reflects Congress's understanding that resource recovery operations involving conversion of solid waste to energy are comprehensively described by the collective terms it used. *See* RCRA § 1004(7) and (34), 42 U.S.C. 6903(7) and (34) (defining hazardous waste management and treatment).

United States' Brief at 15, *City of Chicago* (No. 91-1328).

In short, reading the statute as a whole, and in accord with the meaning that is most in harmony with its context and the ordinary meaning of its terms, ash is excluded from regulation as a hazardous waste under Section 3001(i).

C. The Legislative History of Section 3001(i) Confirms That Congress Excluded Ash from Regulation as a Hazardous Waste at Resource Recovery Facilities Complying with the Requirements of the Exclusion.

The unambiguous and incontrovertible legislative history of Section 3001(i), contained in the Senate Report that was adopted in total in the Conference Report, clearly confirms that Congress excluded ash from regulation as a hazardous waste at facilities meeting the requirements of the statute. As an initial matter *amici* are aware that under some circumstances some members of this Court have cautioned against use of legislative history to aid in statutory construction because of the inherent difficulty in determining Congressional "intent" and because of other perceived abuses use of such history entails.[10] Other justices have followed the more tradi-

---

[10] *Blanchard v. Bergeron*, 489 U.S. 87, 99 (1989) (Scalia, J., concurring in part and concurring in the judgment); *Public Citizen v. United States Dept. of Justice*, 491 U.S. 440, 474-75 (1989) (Kennedy, J., concurring in the judgment).

tional view that legislative history is useful to confirm the plain meaning of a statute, to help interpret an ambiguous statute, or to ensure that a literal reading of the plain meaning does not lead to a result that Congress could not have intended.[11]

In no event does this case involve an undisciplined use of legislative history. To the contrary, use of such history is particularly appropriate here. First, *amici* set forth below the *entire* legislative history of Section 3001(i); this is not a case where a litigant selectively quotes "snippets of analysis," [12] nor is it an instance where, in the words of Judge Harold Leventhal, a litigant looks out over a "crowd" of legislative history in search of "friends." [13]

---

[11] *See e.g., Conroy Aniskoff,* —— U.S. ——, 113 S. Ct. 1562, 1565-66 (1993) (Stevens, J.) (using legislative history to confirm interpretation of the plain language of the Soldiers' and Sailors' Relief Act of 1940); *Browning-Ferris Indus. v. Kelco Disposal, Inc.,* 492 U.S. 257 (1989) (Blackmun, J.) (using legislative history of eighth amendment to determine that Excessive Fines Clause does not cover punitive damages in civil suits); *Texas State Teachers Assoc. v. Garland Indep. School Dist.,* 489 U.S. 782, 790-91 (1989) (O'Connor, J.) (using legislative history to interpret meaning of term "prevailing party" for purposes of obtaining attorneys fees under § 1988); *Bowen v. Georgetown Univ. Hosp.,* 488 U.S. 204, 214-15 (1989) (Kennedy, J.) (interpreting ambiguous provision of the Medicare Act and using legislative history directly on point to resolve the issue); *Local Union 1261 v. Federal Mine Safety Commission,* 917 F.2d 42, 44-46 (D.C. Cir. 1990) (Ginsburg, J.) (noting that the meaning of language in the Federal Mine Safety and Health Act providing compensation for mines closed by federal safety inspectors was not "plain" and reviewing the legislative history for guidance); Patricia M. Wald, *The Sizzling Sleeper: The Use of Legislative History in Construing Statutes in the 1988-89 Term of the United States Supreme Court,* 39 Am. U.L. Rev. 277, 286-300 (1990).

[12] *See Blanchard v. Bergeron,* 489 U.S. at 99 (Scalia, J., concurring in part and concurring in the judgment) (Judges should not give legislative force to each snippet of analysis found in committee reports).

[13] *Conroy v. Aniskoff,* —— U.S. ——, 113 S. Ct. at 1567 (citing J. Leventhal).

Second, as shown below, the legislative history in this instance directly addresses Congress's intent in enacting Section 3001(i); [14] it is contained in a Senate Report that was adopted as the Conference Report; [15] and it is undisputed—there are no competing contemporaneous reports, floor statements or the like.

Finally, all justices of this Court agree that legislative history may be used to interpret the meaning of a statutory term that is "most compatible with the surrounding body of law into which the provision must be integrated." *Green v. Bock Laundry Machine Co.,* 490 U.S. at 528 (Scalia, J., concurring in the judgment). Here, the legislative history confirms that, as discussed above, EDF's and the Seventh Circuit's reading of Section 3001(i) turns the statute entirely on its head—a amendment that was intended to promote resource recovery by broadening the applicability of the household waste exclusion is held instead to create impediments to resource recovery by narrowing it. The dual goals of RCRA in general and Section 3001(i) in particular—protecting the environment and promoting resource recovery—are completely incompatible with EDF's reading that ash must be subject to costly and unnecessary Subtitle C regulation.

---

[14] *Pacific Gas & Electric Co. v. State Energy Resources, Conservation & Dev. Comm'n,* 461 U.S. 190, 222 (1983) (relying on House Committee Report directly addressing preemption issue to decide preemption question).

[15] Conference committee reports are generally considered the most reliable forms of legislative materials. *See Thornburg v. Gingles,* 478 U.S. 30, 44 n.7 (1986) (noting that "[w]e have repeatedly recognized that the authoritative source for legislative intent lies in the Committee Reports on the bill."). *See also,* George A. Costello, *Average Voting Members and Other "Benign Fictions": the Relative Reliability of Committee Reports, Floor Debates, and Other sources of Legislative History,* 1990 Duke L.J. 39, 41-43 (1990).

1. *The Senate Report provisions addressing Section 3001(i), which were adopted in total in the Conference Report, confirm that ash is excluded from regulation as a hazardous waste.*

The Senate Report for Section 3001(i) first indicates precisely Congress's intent to clarify the scope of the household waste exclusion for RRFs. The Report also confirms that EPA's household waste exclusion was established to exclude waste streams generated by households and by sources whose wastes are similar to households as stated in the 1980 Preamble:

> The reported bill adds a subsection (d) [sic] to section 3001 to clarify the coverage of the household waste exclusion with respect to resource recovery facilities recovering energy through the mass burning of municipal solid waste. This exclusion was promulgated by the Agency [EPA] in its hazardous waste management regulations established to exclude waste streams generated by consumers at the household level and by sources whose wastes are sufficiently similar in both quantity and quality to those of households.

S. Rep. No. 284, 98th Cong., 1st Sess. 61 (1983) (*see* Appendix at 1a-2a).

The Senate Report then acknowledges the reason for the enactment of Section 3001(i)—that RRFs accept nonhazardous wastes from sources other than households, and that it is important to encourage such facilities and to remove statutory or regulatory ambiguities that may hinder their development:

> Resource recovery facilities often take in such "household wastes" mixed with other, non-hazardous waste streams from a variety of sources other than "households," including small commercial and industrial sources, schools, hotels, municipal buildings, churches, etc. It is important to encourage commercially viable resource recovery facilities and to remove impediments that may hinder their development and operation.

Id.

The Report then sets forth the specific intent of Section 3001(i), namely that it:

> . . . *clarifies the original intent to include within the household waste exclusion activities of a resource recovery facility* which recovers energy from the mass burning of household waste and non-hazardous waste from other sources.

Id. (emphasis added). The phrase "activities of a resource recovery facility" includes all activities; it is not limited, as EDF would have it, to only some activities of an RRF. Moreover, the Report clearly states that it was Congress's original intent to include such activities within the scope of the exclusion, and Section 3001(i) is merely clarifying that original intent.

Finally, the Report concludes that all waste management activities of the RRF are excluded from hazardous waste regulation, including the term "generation" to which EDF and the Seventh Circuit ascribe such importance.

> All waste management activities of such a facility, including the generation, transportation, treatment, storage and disposal of waste shall be covered by the exclusion, if the limitations in paragraphs (1) and (2) of subsection (d) [sic] are met.

Id.[16] The Conference Committee adopted, without change, the provision proposed by the Senate.[17] This leg-

---

[16] The Senate Report also provides that a facility that has in place the precautionary measures against unintended acceptance of hazardous waste should not be penalized for the "occasional, inadvertent receipt and burning of hazardous material" from commercial or industrial sources. *Id.*

[17] SECTION 223—CLARIFICATION OF HOUSEHOLD WASTE EXCLUSION

House Bill.—No provision.

Senate amendment.—The Senate amendment clarifies that an energy recovery facility is exempt from hazardous waste requirements if it burns only residential and non-hazardous

islative history confirms that ash from RRFs that meet the requirements of Section 3001(i) will not be regulated as a hazardous waste. As the Southern District held, the "Senate Report could not be more explicit." 725 F. Supp. at 765.

2. *The Seventh Circuit majority and EDF misread the legislative history of Section 3001(i).*

Two judges in the Seventh Circuit reference only the one line from the Senate Report that mentions the word "generation" and conclude that they will not "rely upon a single word in a committee report that did not" make its way into the statutory language. *City of Chicago*, 948 F.2d at 351. The flaw in this reasoning is that it ignores entirely the rest of the Senate Report in which Congress explains in detail the scope and purpose of the 1984 exclusion. The legislative history does not consist of only "one word." [18]

EDF argued in the Second Circuit that the legislative history demonstrates that Congress rejected "a waste stream exemption in favor of an exemption of specific and limited activities," or, put slightly differently, that Congress abandoned EPA's "expansive 'waste stream' approach in favor of a narrower exclusion." Appellant's Brief at 20, 26, *Wheelabrator* (No. 90-7437); Appellants' Brief at 20, 26, *City of Chicago* (No. 90-3060). This argument is made up out of whole cloth. There is no support for it in the language or legislative history of

---

commercial wastes and establishes procedures to assure hazardous wastes will not be burned at the facility.

Conference substitute.—The Conference substitute is the same as the Senate amendment.

H.R. Conf. Rep. No. 1133, 98th Cong., 2nd Sess. 79, 106 (1984), *reprinted in* 1984 U.S.C.C.A.N. 5649, 5677.

[18] *See Mead Corp. v. B.E. Tilley*, 490 U.S. 714, 723 (1989) (noting that the deletion of a single word, the word "accrued," in Conference Committee amendments did not evince "an intent to require the provision of unaccrued as well as accrued benefits"; the Court interpreted the statute to apply only to accrued benefits despite the omission of that term).

the statute. To the contrary, the Senate Report, adopted as the Conference Report. expressly states that other nonhazardous "waste streams" should be included within the scope of the exclusion. S. Rep. No. 284, 98th Cong., 1st Sess. 61 (1983). Indeed, as the Southern District put it, "Nowhere in the 1984 exclusion, nor in the Committee report which accompanied it, is there any hint of a congressional intent to limit the scope of that earlier [household waste] exclusion." 725 F. Supp. at 765.

If Congress had intended to exempt a narrower set of activities under Section 3001(i) than household waste "in all phases of its management" as provided in the 1980 Preamble, Congress would undoubtedly have said so in order to ensure that there would be no confusion between the regulatory and statutory exclusions. Congress did not do so.

Instead, Congress chose explicitly to "clarify" that an existing regulatory exclusion should apply to an important category of plants—resource recovery facilities—that burn household and similar wastes, as long as those facilities complied with new prophylactic requirements. This is not, in other words, a case in which the Court must struggle to interpret the meaning of congressional failure to address an agency's interpretation of a rule; [19] rather, this is a case in which Congress stated unequivocally its intent to affirm an agency rule, and to clarify that the rule—which clearly covered management of ash—should be applied to RRFs that accept nonhazardous municipal wastes together with household wastes.

---

[19] *See Young v. Community Nutrition Inst.*, 476 U.S. 974, 983 (1986) (*quoting NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 275 (1974) ("congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress"). *Cf. Haig v. Agee*, 453 U.S. 280, 297 (1981) (holding that Congress adopted an administrative construction in a reenacted statute where Congress used the same language as the previous statute and legislative history revealed that Congress was aware of a longstanding administrative interpretation of that provision).

In addition, EDF and the Seventh Circuit's analysis would lead to the anomalous result that ash from incinerators, including RRFs, that accept only household waste is excluded from regulation as a hazardous waste, while ash from RRFs that process the same type of waste streams and that meet the contractual, inspection and notification requirements of Section 3001(i) is not excluded from Subtitle C. There is no support for this reading in the language or legislative history of the statute, and in fact, such a reading is precisely the opposite of what Congress intended. EDF's reading would, to use the words of the Senate Report, "discourage" rather than "encourage" commercially viable RRFs, and it would "create" rather than "remove" impediments that may hinder the development and operation of RRFs.

Finally, EDF argues that the 1984 Hazardous and Solid Waste Amendments universally broadened the reach of the RCRA program by requiring more wastes to be regulated as hazardous and by imposing more stringent requirements on hazardous waste regulation, and thus Section 3001(i) must be read as a narrowing of the household waste exclusion. *See* Appellants' Brief at 27-30, *City of Chicago* (No. 90-3060); Appellant's Brief at 27-30, *Wheelabrator* (No. 90-7437).[20] Congress did not, however, make less stringent the regulation of RRFs in 1984; it merely clarified that Congress had always intended the household waste exclusion to extend to a broader category of RRFs that received and burned nonhazardous commercial and industrial wastes. Moreover, Congress imposed additional restrictions on RRFs that were not previously embodied in the household waste exclusion.

[20] EDF virtually ignored, however, both the legislative and regulatory history of Section 3001(i) and the history of Congress' expressed desire to promote resource recovery facilities. EDF's agrument is therefore irrelevant. *See Board of Governors of Federal Reserve System v. Dimension Finance Corp.*, 474 U.S. 361, 373-74 (1986) ("Application of 'broad purposes' of legislation at the expense of specific provisions ignores the complexity of the problems Congress is called upon to address and the dynamics of legislative action").

In order to be eligible for the exclusion, RRFs must have adequate contractual arrangements, inspection procedures, or other notification requirements to ensure that hazardous waste is not received and burned. 42 U.S.C. § 6921(i)(2). Section 3001(i) did not, in other words, relax existing requirements, but rather clarified their scope and imposed additional restrictions.

II. EPA INTERPRETS THE STATUTE TO EXCLUDE ASH FROM REGULATION AS A HAZARDOUS WASTE AT QUALIFYING RESOURCE RECOVERY FACILITIES.

An agency's construction of the statute it administers is only consulted when Congress's intent regarding the provision at issue is unclear. Where Congress has directly addressed the point at issue, and its intent is clear from the plain meaning of the statute and the legislative history, deference to an agency interpretation is not required. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1974). As set forth above, Congress directly excluded ash from regulation as a hazardous waste. Therefore, any interpretation by EPA contradicting Congress's express intent would be entitled to no deference. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 131 (1985).

However, in the Reilly Memorandum EPA takes the formal position that the statutory language and legislative history of Section 3001(i) support the interpretation that the exclusion covers ash. Reilly Memorandum at 1.[21] The Reilly Memorandum cites policy considerations, including protecting the environment, promoting resource recovery from nonhazardous solid waste, promoting energy recovery, and reducing the volume of wastes disposed of in

[21] The Reilly Memorandum explicitly invalidated all prior EPA positions on ash from RRFs. Reilly Memorandum at 1. Thus, EDF's strenuous reliance on the preamble to EPA's 1985 regulation in all its briefs in this and the Second Circuit cases is no longer valid. *See, e.g.*, Appellant's Brief at 32, *Wheelabrator* (No. 90-7437); Appellants' Brief at 32, *City of Chicago*, (No. 90-3060), *citing* 50 Fed. Reg. 28,702, 28,725-26 (1985).

landfills, to support its view that ash is not subject to regulation under Subtitle C. Reilly Memorandum at 5-6. Accordingly, EPA's formal position on the regulatory status of ash is in full harmony with the statutory language and legislative intent.

CONCLUSION

For all the reasons discussed above, the Seventh Circuit's decision should be reversed, and this Court should hold that ash is not subject to regulation as a hazardous waste under RCRA. The entire "household" waste stream, together with nonhazardous waste from other sources that is similar in composition to household waste, is exempt from the moment it is put out on the curb until it is ultimately disposed of as ash residue from an RRF.

Respectfully submitted,

MARK P. PAUL
Vice President and General Counsel
WHEELABRATOR TECHNOLOGIES INC.
Liberty Lane
Hampton, NH 03842
(603) 929-3000

HAROLD HIMMELMAN
Counsel of Record
DAVID M. FRIEDLAND
MARGARET LATTIN BAZANY
BEVERIDGE & DIAMOND, P.C.
1350 I Street, N.W., Suite 700
Washington, D.C. 20005
(202) 789-6000

INTEGRATED WASTE SERVICES ASSOCIATION
1133 21st Street, N.W.
Suite 205
Washington, D.C. 20036
(202) 467-6240

Attorneys for Amici

August 19, 1993

APPENDIX

S. Rep. No. 284, 98th Cong., 1st Sess. 61 (1983)

* * * *

[61] CLARIFICATION OF HOUSEHOLD WASTE EXCLUSION

The reported bill adds a subsection (d) to section 3001 to clarify the coverage of the household waste exclusion with respect to resource recovery facilities recovering energy through the mass burning of municipal solid waste. This exclusion was promulgated by the Agency in its hazardous waste management regulations established to exclude waste streams generated by consumers at the household level and by sources whose wastes are sufficiently similar in both quantity and quality to those of households.

Resource recovery facilities often take in such "household wastes" mixed with other, non-hazardous waste streams from a variety of sources other than "households," including small commercial and industrial sources, schools, hotels, municipal buildings, churches, etc. It is important to encourage commercially viable resource recovery facilities and to remove impediments that may hinder their development and operation. New section 3001(d) clarifies the original intent to include within the household waste exclusion activities of a resource recovery facility which recovers energy from the mass burning of household waste and non-hazardous waste from other sources.

All waste management activities of such a facility, including the generation, transportation, treatment, storage and disposal of waste shall be covered by the exclusion, if the limitations in paragraphs (1) and (2) of subsection (d) are met. First, such facilities must receive and burn only household waste and solid waste from other sources which does not contain hazardous waste identified or listed under section 3001.

Second, such facilities cannot accept hazardous wastes identified or listed under section 3001 from commercial

or industrial sources, and must establish contractual requirements or other notification or inspection procedures to assure that such wastes are not received or burned. This provision requires precautionary measures or procedures which can be shown to be effective safeguards against the unintended acceptance of hazardous waste. If such measures are in place, a resource recovery facility whose activities would normally be covered by the household waste exclusion should not be penalized for the occasional, inadvertent receipt and burning of hazardous material from such commercial or industrial sources. Facilities must monitor the waste they receive and, if necessary, revise the precautionary measures they establish to assure against the receipt of such hazardous waste.